APPENDIX.

Act 5149. Deering's General Laws [Stats. 1931, P. 2475].

An act relating to the liability in damages of municipalities, counties, cities and counties, and school districts, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property; prescribing the duties of the officers thereof in such cases, and authorizing such public or quasi-public corporations to take out and pay for insurance to protect them against such liability.

1. Claim for Damages Suffered on Public Property. Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received.

2. Duty of Attorney for Municipality, etc. Whenever any suit for damages is brought against any municipality, county, city and county, or school district on account of injuries to persons or property, alleged to have been received as a result of the dangerous or defective condition of any public streets, highway, building, park, grounds, works or property, it shall be the duty of the attorney for such municipality, county, city and county, or school district, as the case may be, to act as counsel in defense of such suit, unless lawful provision has been made for the employment of other counsel in connection therewith; and the fees and expenses involved therein shall be a lawful charge against such municipality, county, city and county, or school district, as the case may be.

3. Municipalities, etc., May Insure. Municipalities, counties, cities and counties, or school districts, may insure against any liability, other than a liability which may be in-

sured against under the provisions of the workmen's compensation insurance and safety act, or under the workmen's compensation insurance and safety act of 1917, for injuries or damages resulting from the dangerous or defective condition of public streets, highways, buildings, parks, grounds, works and property, either by self-insurance, or in any insurance company authorized to transact the business of such insurance in the State of California; and the premium for such insurance shall be a proper charge against the public treasury of such municipality, county, city and county, or school district, as the case may be.

4. Payment or Compromise of Claims. In any case where legal liability is admitted or disputed the municipality, county, city and county, or school district may pay any bona fide claim or compromise any such disputed claim out of public funds, provided that in any such compromise the district attorney, city attorney, county counsel, or attorney having charge of such matters approves the terms of such compromise.

5. Definitions. Wherever the words "person" or "public" are used in this act, such words shall be deemed to include any pupil attending the public schools of any school or high school district.

Section 4075 of the Political Code of California, a general law with reference to the filing of claims against counties and districts therein, allowing one year for the filing thereof, provides as follows:

"The board of supervisors must not hear or consider any claim in favor of any public officer, person, corporation, company, or association against the county, nor shall the board credit or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates and particular service rendered, character of process served, upon whom, distance traveled, where and when, character of work done, number of days engaged, supplies or materials furnished, to whom, and quantity and price paid therefor, duly verified to be correct, and that the amount claimed is justly due, and is presented and filed with the clerk of the board, or with the auditor, according to the procedure prescribed for the particular county,

within a year after the last item of the account or claim accrued. If, in case of any claim which requires itemizing, the board do not hear or consider the same because it is not itemized, they shall cause notice to be given to the claimant or his attorney of that fact and give time to have the claim itemized and reverified; provided that the verification of claims may be dispensed with as provided in section 4076 of this code."

"*Presentation of claims.* All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof, or of any district or public entity the funds of which are controlled by the board of supervisors, or of any officer or employee of any such district or public entity, shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part. In presenting any claim not founded upon contract full details as to the nature of the claim, the time and place when and where it arose, the public property and public officers or employees alleged to be at fault, the nature, *extent and amount of the injury or damage claimed,* and all other details necessary to a full consideration of the merit and legality of such claim shall be stated in writing signed by the claimant or someone authorized by him, and in all other respects such claims shall be presented and acted upon in the same manner as claims founded upon contracts. (Added by Stats. 1907, p. 379; Amended by Stats. 1913, p. 835; Stats. 1915, p. 1185; Stats. 1931, p. 197.)" (Italics ours.)

IN THE

Supreme Court of the United States

October Term, 1940
No. 580

MILTON K. YOUNG and MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, a Body Politic Incorporate and a Political Subdivision of the State of California.

Answer to Petition for Writ of Certiorari to the District Court of Appeal, State of California, Second Appellate District, Division Two and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

October Term, 1940
No. 580

MILTON K. YOUNG and MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, a Body Politic Incorporate and a Political Subdivision of the State of California.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent, County of Ventura, a body politic and corporate and a political subdivision of the State of California, respectfully prays:

That petitioners' prayer that a Writ of Certiorari be issued to the District Court of Appeal, Second Appellate District, State of California, to review the judgment of said Court of Appeal affirming the decree of the Superior Court of the State of California, in and for the County of Ventura, in that certain action between the above named parties, which is disclosed by the certified record on file in this proceeding, be denied.

Jurisdictional Statement.

The decision rendered herein by the District Court of Appeal, Second Appellate District, State of California, on the 1st day of July, 1940, wherein the application of the State Statute, Act 5149, Deering's General Laws (Stats. 1931, page 2475), (set forth in full in the Appendix to petition herein, page 1) did not deprive petitioners of their property and property rights in violation of due process and equality provisions of the Fourteenth Amendment of the Constitution of the United States.

Said Statute so applied is not repugnant to the Constitution of the United States. The Statute is applicable to petitioners' case, application thereof under the facts alleged in petitioners' complaint will not violate the due process and equality provisions of the Fourteenth Amendment of the Constitution of the United States.

Respondent denies that petitioners have been denied due process and equality as guaranteed by the Fourteenth Amendment of the Constitution of the United States, but on the other hand, alleges that the petitioners have not been deprived of any rights whatsoever, due process and equality being afforded by Act 5149, Deering's General Laws (Stats. 1931, page 2475), and that petitioners waived the same by their failure to avail themselves of the procedural steps thereof within the time provided by such Statute.

Statement of the Case.

(In order to assist the Court in locating the parcels of real property in respect to the location of the storm ditch here involved, and other objects referred to in the petition, respondent has taken the liberty of appending hereto [Appendix p. 8] a map or plat correctly designating the location of the items mentioned in petitioners' complaint.)

Petitioners, in their complaint filed in the Superior Court of the County of Ventura, State of California, a copy of which complaint is set forth in the transcript of the record in this case [R. 1-9, incl.], alleged that they were the owners of certain orchard land in the County of Ventura, near the town of Piru [R. 1;]; that for more than twenty-two (22) years prior to March 2nd, 1938, the County of Ventura, defendant in said action, had assumed the management and control of storm waters flowing down from Nigger Canyon [R. 2], and that some ten (10) or eleven (11) years prior to March 2nd, 1938, the defendant County of Ventura deepened and widened a storm ditch in the Canyon [R. 3] and constructed a steel and wire revetment [R. 4], thereby diverting storm waters from their natural channel [R. 4]; that the natural channel was abandoned by defendant and the diverted waters then flowed in a storm ditch along the easterly boundary of petitioners' property [R. 5]; petitioners had maintained an embankment along their property on the easterly side adjacent to Nigger Canyon to protect their property from the waters of the Canyon [R. 2]; that the new channel constructed by the defendant was upon privately owned property [R. 5]; that notwithstanding repeated written complaints to defendant to discontinue the use of the new channel, defendant failed to do so [R. 5]; that on March 2nd, 1938, torrential rains fell in the area, and the ditch

of which complaint is made carried the heavy run-off with force and violence from Nigger Canyon against petitioners' embankment, flooding petitioners' land to their serious damage [R. 6]; that nine (9) months and twenty-eight (28) days thereafter, to-wit: December 28th, 1938, petitioners filed with the Board of Supervisors of the County of Ventura, State of California, a claim for damages to petitioners' orchard alleged to have been caused by the said torrential rains occurring on March 2nd, 1938 [R. 7], and thereafter, on the 17th day of January, 1939, said claim was rejected by the Board of Supervisors. Thereafter, on February 27th, 1939, petitioners filed their complaint in the Superior Court of the County of Ventura, State of California, against the County of Ventura, the respondent herein [R. 1]. Thereafter on March 11th, 1939, the defendant, County of Ventura, respondent herein, filed its demurrer [R. 27], which demurrer was regularly heard and submitted and the Judge of the Superior Court on the 20th day of November, 1939, sustained said demurrer without leave to amend [R. 30] and judgment that plaintiffs take nothing by their action was entered December 7th, 1939 [R. 31]. Notice of appeal to the Supreme Court of the State of California from said judgment was served and filed December 20th, 1939 [R. 31], and the case was transferred for hearing by the Supreme Court of the State of California to the District Court of Appeal, Second Appellate District, State of California, which, in due course, rendered its opinion affirming the judgment of the Superior Court of the County of Ventura (*Young v. Ventura Co.*, 102 Cal. App. Dec. 127). Rehearing of said cause by the Supreme Court after the decision of the District Court of Appeal was denied by the Supreme Court on August 29th, 1940, and has now become final. [R. 32 to 38, incl.]

Reasons Relied Upon for Denial of Writ of Certiorari.

1. Deering's General Laws, Act 5149 (Statutes of 1931, page 2475), is not a statute of limitations, but is an act providing the procedure regulating the filing of claims for damages alleged to have resulted from a dangerous or defective condition of public works, grounds or property. The claimant must comply with the conditions precedent set forth in this statute before he may bring suit. This act confers jurisdiction, and fixes a time within which it may be exercised. It does not relate to the commencement of actions. It does, however, provide the due process and equalities provided by the Fourteenth Amendment of the Constitution of the United States.

Winters v. City of Niagara Falls, 190 N. Y. 198, 82 N. E. 1101;

Hathaway v. Merchants' Loan and Trust Company, 75 N. E. 1060;

Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712;

Western Salt Company v. City of San Diego, 181 Cal. 696, 186 Pac. 345;

Crescent Wharf Company v. City of Los Angeles, 207 Cal. 430, 278 Pac. 1028;

Thompson v. County of Los Angeles, 140 Cal. App. 73, 35 Pac. (2d) 185;

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Spencer v. City of Calipatria, 9 Cal. App. (2d) 267, 49 Pac. (2d) 320;

Johnson v. City of Glendale, 12 Cal. App. (2d) 389, 55 Pac. (2d) 580;

Cooper v. County of Butte, 17 Cal. App. (2d) 43, 61 Pac. (2d) 516;

Strath v. City of Santa Rosa, 19 Cal. App. (2d) 382, 65 Pac. (2d) 894;

Yonker v. City of San Gabriel, 23 Cal. App. (2d) 556, 73 Pac. (2d) 623;

Kahrs v. County of Los Angeles, 28 Cal. App. (2d) 46, 82 Pac. (2d) 29;

Gapin v. City of Los Angeles, 34 Cal. App. (2d) 660, 94 Pac. (2d) 359.

Conclusion

It is respectfully submitted that inasmuch as the question of due process and equal protection under the Fourteenth Amendment of the Constitution of the United States was pointedly raised in petitioners' complaint in the lower court, in the printed briefs on appeal to the Courts of Appeal of the State of California, both by appellant and respondent, and again in the oral argument before said Courts, that issue was duly considered by the District Court of Appeal in its decision now questioned by petitioners, and was considered by the Supreme Court of California before denying the petition for rehearing in that Court.

And there can be no doubt that the District Court of Appeal must have had in mind the questions now raised by respondent in regard to the due process and equality clauses of the Fourteenth Amendment when said Court in its opinion stated as follows [R. 34]:

> "Plaintiffs' point that compliance with the ninety-day period for filing their claim is violative of their *constitutional rights* was passed upon adversely to

> their contention in Yonker v. City of San Gabriel, *supra,* where the facts presented a situation very similar to that now before us." (Italics added.)

and again stated [R. 36]:

> "Plaintiffs cannot successfully argue that by the statutory requirement of filing a claim they were deprived of due process of law. *The legislature has furnished due process to them but they did not avail themselves of it.*" (Italics added.)

We respectfully submit that petitioners have not been denied any of the rights provided by the Fourteenth Amendment of the Constitution of the United States and that the prayer for Writ of Certiorari should be denied.

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H. F. ORR,
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IN THE

Supreme Court of the United States

October Term, 1940

No. 580

MILTON K. YOUNG and MELISSA E. YOUNG,

Petitioners,

vs.

COUNTY OF VENTURA, a Body Politic Incorporate and a Political Subdivision of the State of California.

BRIEF IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

A concise statement of the case, and reasons relied upon by respondent for denial of the Writ are set out in the Answer to Petition for Writ of Certiorari.

ARGUMENT.

The Complaint Does Not State a Cause of Action for the Reason That Petitioners Did Not Plead the Filing of a Verified Claim Within Ninety (90) Days After the Alleged Damage Took Place (Section 1, Act 5149, Deering's General Laws, 1937, Stats. 1931, Page 2475).

(For the sake of brevity, unless otherwise specified, wherever the term "Act 5149" is used, it will be considered as referring to Chap. 1167, Stats. 1931, page 2475, that enactment also being known as Act 5149, Deering's General Laws of California.)

Inasmuch as the demurrer herein is premised upon the failure of petitioners to allege the filing of a verified claim within ninety (90) days as required by section 1 of Act 5149, it is thought well at this point to set out section 1 thereof in full.

Act 5149, Deering's General Laws of California, Chap. 1167, Stats. 1931, page 2475:

> *"Sec. 1. Claim for damages suffered on public property.* Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claims shall specify the name and address of the complainant, the date and place of the accident and the extent of the injuries or damages received." [Statute in full set out in Appendix, p. 1.]

It is respectfully submitted that since the enactment of Act 5149 it has been consistently held by the District Court of Appeal and the Supreme Court of California that the requirements thereof relative to the filing of a claim against a city or county within ninety (90) days after such accident has occurred are necessary, mandatory and prerequisite to the maintaining of a suit for recovery against the county, and a complaint which fails to plead the filing of a claim coming within the provisions of section 1 of Act 5149, is subject to general demurrer, and where it appears upon the face of the complaint that the plaintiff is unable to amend to bring his complaint within the scope of said Act 5149, the demurrer should be sustained without leave to amend.

A. A Storm Ditch Constructed and Maintained by a County Is a "Public Works" Within the Meaning of Act 5149, Deering's General Laws, etc.

It will be noted by section 1 of Act 5149, that *"whenever it is claimed that any person has been injured or any property damaged* as a result of the *dangerous or defective condition of any public . . . works or property,"* a claim must be filed within the time therein limited. The question then arises—is a storm drain or storm ditch for the carrying off of storm waters a public works? It is the contention of the respondent that such a project is unquestionably a public work, within the scope and meaning of section 1 of Act 5149. In this contention the Courts of California undoubtedly concur, as evidenced by the decision of the District Court of Appeal in the recent case of *Kahrs v. County of Los Angeles,* 28 Cal. App. (2d) 46, 82 Pac. (2d) 29 (*decided in August,* 1938).

In that case, while the text does not in so many words state that such a ditch is a public works, the facts of the case and the ruling of the Court thereon do definitely establish the contention of respondent. The facts in the *Kahrs* case were: floods occurring in Los Angeles County and drained through the drainage ditch of a drainage improvement district in that county overflowed, damaging the plaintiff Kahrs. Defendant county demurred on the ground that the plaintiff had not pleaded the filing of a verified claim within the period of ninety (90) days after the damage occurred as provided by Act 5149. Demurrer in that case was sustained without leave to amend, and on appeal the appellant there (as do petitioners here), contended that he was entitled to rely upon section 4075 of the Political Code of the State of California (referring generally to the filing of claims against counties), and that Act 5149 did not apply to the facts of his case. [Section 4075 of the Political Code of the State of California set out in full in Appendix p. 3.] These contentions were overruled by the California District Court of Appeal.

The case of *Yonker v. City of San Gabriel,* decided in 1937, and reported in 23 Cal. App. (2d) 556, 73 Pac. (2d) 623, was another case involving an alleged taking or damaging of property by a municipal corporation. In that case (quoting from page 557 of said opinion):

> "It is alleged in the complaint that the dumping of said oil-impregnated gravel and refuse material was done carelessly and negligently by the servants and employees of the City of San Gabriel. It is further alleged that the *plaintiff gave notice to the defendants of the matters complained of herein,* but that said defendants took no measures to prevent the

injury to plaintiff's premises by reason of the manner in which the oil-impregnated gravel and refuse matter had been dumped upon the abutments aforesaid and took no measures whatever to prevent the waters of said wash from carrying the same down to, over and upon the lands belonging to the plaintiff." (Italics added.)

Swollen by torrential rains, the stream flowing under the bridge washed away, and then deposited the oil-impregnated materials over the sand and gravel beds of the plaintiff Yonker, damaging the same for the purposes theretofore used, *i. e.*, the sand and gravel business. In that case, the plaintiff contended, as do petitioners in this case, that Act 5149 did not apply, that *the damage was a "taking", prohibited by article I, section 14,* of the California Constitution, and that it was not necessary to file a claim within the ninety-day period required by section 1 of Act 5149. (In the *Yonker* case, *supra,* a purported claim was filed within the period of ninety (90) days, but was found to be insufficient.)

The *Yonker* case, *supra,* holds that the act complained of was not a "taking", and that Act 5149 is controlling. In this regard, the Court said (23 Cal. App. (2d) at page 558):

"(1) Responding to the objection that no verified claim was filed as required by law it is the contention of the plaintiff that under section 14 of article I of the Constitution the filing of a verified claim against the City of San Gabriel was unnecessary. The section of the Constitution referred to provides that private property shall not be taken or damaged for public use without just compensation being made therefor. At the time of the dumping of the ma-

> terial herein referred to by the agents of the City of San Gabriel upon the abutments of the Ramona Street bridge no property of the plaintiff was either taken or damaged. The damage, if any, was as the authorities claim, c nsequential, but whether it correctly be denominated consequential or direct, immediate, the record shows no damage resulted from the mere fact of dumping the refuse material upon the abutments referred to, but that subsequently torrential rains occurred, causing an excessive flow in the wash referred to, the waters thereof carrying down the refuse matter upon the property belonging to the plaintiff."

A careful analysis of the facts upon which the *Yonker* case, *supra,* is founded and upon which the petitioners' case is founded, will disclose that the facts of the two cases are, to all intents and purposes, identical. At the time the respondent County built the ditch, diverted the natural flow of water from Nigger Canyon, and "assumed control" of the storm waters therefrom, and the widening and deepening operations were performed, no damage whatever resulted to petitioners, nor was any of their property "taken or damaged", nor was it even invaded in any way. Conceding then for the sake of argument, the allegations of petitioners' complaint, that torrential rains and heavy flow of storm waters here, as in the *Yonker* case, broke over and deposited sand and debris in appellants' orchard, causing damage, but not making the orchard or the land "entirely valueless" as was contended in the *Yonker* case, we submit, the cases are, upon the facts, identical, and it should logically follow that the decision of this Court should follow the rule established in many earlier cases and reiterated in the *Yonker* case.

And in this regard, the case of *Kahrs v. County of Los Angeles, supra,* decided in 1938, cannot be disregarded. While the facts in that case are not stated in clear detail, it sufficiently appears from the decision that the run-off following heavy rains caused the overflow of drainage ditches or canals in Drainage Improvement District No. 1 in Los Angeles County, damaging land and personal property of the plaintiff Kahrs. Contention was made that the act was not controlling in that the heading of section 1 placed thereon by the editor of Deering's Codes reads "Claim for Damages Suffered on Public Property" and that the damage complained of by plaintiff Kahrs occurred on his private property. The decision definitely disposes of this contention and rules that Act 5149 was controlling. It will be noted that this case, so far as the facts are stated in the decision, is a parallel of the case now before the Court.

"Public works" have been defined by Black's Legal Dictionary, Second Edition, as

> "Works, whether of construction or adaptation, undertaken and carried out by the national, state, or municipal authorities, and designed to subserve some purpose of public necessity, use, or convenience; such as public buildings, roads, aqueducts, parks, etc."

Certainly the construction and maintenance of storm drainage ditches and channels by a county to protect public and private property in time of flood is a "public works" within the meaning of Act 5149, and the cases above cited, and ownership of the right of way upon which the public work was located, whether owned in fee or merely an easement for the doing, creating and maintaining of such public works, the ownership is such that the fee or ease-

ment would be classed as "public property" within the meaning of Act 5149. Any damage caused by a dangerous or defective condition of any such works or property would be a damage contemplated by section 1 of Act 5149.

B. THE TERM "ACCIDENT" AS USED IN ACT 5149 MUST BE CONSTRUED TO MEAN "DAMAGE" UNDER THE CIRCUMSTANCES OF THIS CASE.

Counsel has stressed somewhat the fact that Act 5149 states that the claim must be filed within ninety days after the "accident" occurred, and states that the word "accident" as used in the Act does not mean "damage", and that the time within which he must file his claim would not begin to run until the damages could be ascertained.

Webster's New International Dictionary defines "accident" as follows:

> "Accident—a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden or unexpected event; chance; contingency; often an undesigned and unforeseen occurrence of an affliction or unfortunate character; casualty; mishap; as to die by an accident."

Black's Law Dictionary, 2nd Edition, quoting Wharton gives the following meaning for the word "accident":

> "The meaning to be attached to the word 'accident', in relation to equitable relief, is any unforeseen and undesigned event productive of disadvantage."

At the risk of being deemed repetitious, respondent desires to remind the Court that throughout this case, the same contention has been made. Throughout the case

respondent has contended, and now contends that the damages resulting to petitioners were without "foresight" or "expectation", were "an undesigned, sudden and unexpected event". It is apparent that the term "accident" as used in Act 5149 applies to, and was meant to apply to the state of facts involved in this cause, and the act making no exceptions, the provision requiring the filing of a claim within ninety (90) days applies to petitioners. It was mandatory, and the following cases involving damage to real property by storm waters, so hold, (*Kahrs v. County of Los Angeles, supra; Yonker v. San Gabriel, supra*). Act 5149 not having been complied with by petitioners, the demurrer to their complaint should have been, and was, sustained without leave to amend.

C. The Filing of a Claim for Damages Coming Within the Scope of Act 5149 Within Ninety (90) Days After Such Damages Occurred Is a Mandatory Procedural Step, and Until the Filing of Such a Claim Within Such Ninety (90) Day Period the Court Does Not Acquire Jurisdiction to Hear and Determine the Cause.

The decisions of the District Court of Appeal and of the Supreme Court of California, both before and after the passing of Act 5149, having consistently held that where a statute provides a procedural step as a prerequisite to the filing of a suit, such prerequisite or procedural step must be substantially complied with, and such compliance or substantial compliance must be pleaded or the complaint in any such action fails to state a cause of action, and is subject to general demurrer. And this rule is applicable whether the complaint be one against a city,

county or school district seeking damages for personal injuries, or to recover for the taking or damaging of real property, where the injury or damage complained of is the result of a dangerous or defective condition of any public works, grounds or property.

The leading cases of *Western Salt Co. v. City of San Diego,* 181 Cal. 696, 186 Pac. 345 (1919), and *Crescent Wharf Co. v. City of Los Angeles,* 207 Cal. 430, 278 Pac. 1028 (1929), though decided before the enactment of Act 5149, deal with the exact situation here before the Court, and have been, and still are, cited with approval and as authority for the rule that where a charter or other statute requires the filing of a claim as a procedural step preliminary to the bringing of a suit for damages against the public body specified by the charter or statute in question, such preliminary procedural step is mandatory and failure to comply therewith, and to plead such compliance, is fatal to the cause of action.

Western Salt Company v. City of San Diego, supra. This was an action against the City of San Diego for damages arising from the collapse of the "lower Otay dam". The city charter of the City of San Diego, at that time provided (page 696 of the decision)—

> ". . . all claims for damages against the city must be presented to the common council and filed with the clerk within six months after the occurrence from which the damages arose, . . ."

In discussing this provision and the necessity for filing claims thereunder, the Court says on page 699:

> "There is no general law upon that subject, but the charter of each municipality prescribes the method for

such payment. The charter controls and, as the plaintiff has failed to present his claim for damages within the time provided by the charter, the demurrer was properly sustained."

Crescent Wharf Company v. City of Los Angeles, supra. Here the action arose from an alleged "taking for public use", *in violation of article I, section 14, of the California Constitution.* It was claimed that the wharf of plaintiff was totally destroyed, it having collapsed by reason of being undermined by the operations of the City of Los Angeles in dredging the San Pedro harbor basin. The charter of the City of Los Angeles, at that time, contained a provision (page 633 of the decision) that in the event of any claim for damages against the city, a written claim must be filed with the city within a period of six (6) months after the occurring of the damages.

It will be noted in reading the opinion in the *Crescent Wharf* case, *supra,* that the plaintiffs in that case, as do petitioners in the case now before the Court, contended that the acts of the City of Los Angeles amounted to a taking for public use without compensation first having been made as provided in article I, section 14 of the California Constitution.

The Court, in *Crescent Wharf Company v. City of Los Angeles, supra,* adopted the ruling made in *Western Salt Company v. City of San Diego, supra,* upholding the validity of charter provisions requiring the filing of claims for damages within a definite period, and held that the failure so to file would bar the right of action. These are leading cases on this point, cited in the California decisions wherever the point is involved.

The following cases, decided after the enactment of Act 5149, based upon the provisions of section 1 thereof, are to the same effect. In each of these cases, all of which were based upon Act 5149, it is specifically held that the provisions of the Act are mandatory and that section 1, relating to filing of claims within the period of ninety (90) days is a procedural prerequisite to the filing of a suit that must be at least substantially complied with, but particularly is it held that where there is a failure to file a claim within said period of ninety (90) days, the Court cannot acquire jurisdiction; that it is "fatal to the cause of action" or "that no cause of action accrues", or that such failure bars recovery against a city, county, etc.

Los Angeles Athletic Club v. Long Beach, 128 Cal. App. 427, 17 Pac. (2d) 1061 (1932);

Phillips v. County of Los Angeles, 140 Cal. App. 78, 35 Pac. (2d) 187 (1934);

Thompson v. County of Los Angeles, 140 Cal. App. 73, 35 Pac. (2d) 185 (1934);

Norton v. Pomona, 5 Cal. (2d) 54 at 56, 53 Pac. (2d) 952 (1935);

Myers v. Hopland Union Elementary School District, 6 Cal. App. (2d) 590, 44 Pac. (2d) 654 (1935);

Spencer v. Calipatria, 9 Cal. App. (2d) 267, 49 Pac. (2d) 320 (1935);

Johnson v. City of Glendale, 12 Cal. App. (2d) 389, 55 Pac. (2d) 580 (1936);

White-Satra v. City of Los Angeles, 14 Cal. App. (2d) 688, 58 Pac. (2d) 933 (1936);

Cooper v. Butte, 17 Cal. App. (2d) 43, 61 Pac. (2d) 516 (1936);

Strath v. Santa Rosa, 19 Cal. App. (2d) 382, 65 Pac. (2d) 894 (1937);

Yonker v. San Gabriel, supra;

Kahrs v. City of Los Angeles, supra;

Gapin v. City of Los Angeles, 34 Cal. App. (2d) 660, 94 Pac. (2d) 359 (1939).

If no cause of action accrues by reason of the failure to file, and to allege that such a claim was filed, within the time provided by section 1 of Act 5149, as stated in most of the decisions above cited, certainly the Court has no jurisdiction to hear or determine an action in which there is no cause, or in which the complaint is fatally defective upon its face.

D. THE REQUIREMENT THAT SUCH A CLAIM BE FILED MAY NOT BE WAIVED BY THE BOARD OF SUPERVISORS OF THE COUNTY, NOR DOES THE ALLEGED DISABILITY OF THE PETITIONERS EXTEND THE PERIOD.

It is more than evident from the cases decided by the Courts of California, that the provisions of section 1 of Act 5149 are mandatory and that not even physical disability or other disability shall operate to overcome the mandatory provisions of the section. It has been held that even the fact that the person injured is a minor, will not operate to lift the case out of the mandatory provisions of the section. One of the cases so holding is the case of *Myers v. Hopland Union Elementary School District, supra,* at page 591, where the Court says:

"The provisions of this section are mandatory and a person has no right to maintain such an action

unless he complies therewith. (*Thompson v. City of Los Angeles,* 140 Cal. App. 73 (35 Pac. (2d) 185.) (3) Plaintiff, although a minor, is bound by its provisions as there is nothing in the act excepting minors from its operation. (*Phillips v. City of Los Angeles,* 140 Cal. App. 78 (35 Pac. (2d) 187).)"

And it has been held that the fact that the person injured was physically unable to present her claim within the time allowed under section 1 of the Act will not relieve the claimant from the mandatory provisions of the section of said Act. (*Johnson v. City of Glendale, supra.*) In the *Johnson* case, above cited, the Court states that the question of whether disability is a valid excuse for the non-filing of a claim within the period provided in statutes of this kind making the filing of claims a prerequisite to the maintaining of an action for damages, is in confusion in various jurisdictions, but, the Court then says on page 394:

"The contrary, and we think the more satisfactory, rule is that the giving of notice or the filing of claims within the limited period allowed therefor is purely a matter for legislative control, and that where a law makes compliance mandatory and *no exceptions are provided in the law itself, the courts may provide none under the guise of interpretation or construction.* (*Haynes v. City of Seattle,* 83 Wash. 51 (145 Pac. 73); *People v. City of Valparaiso,* 178 Ind. 673 (100 N. E. 70); *Schmidt v. City of Fremont,* 70 Neb. 577 (97 N. W. 830); *Ellis v. City of Kearney,* 80 Neb. 51 (113 N. W. 803); *McCollum v. City of South Omaha,* 84 Neb. 413 (121 N. W. 438); *Touhey v. City of Decatur,* 175 Ind. 98 (93 N. E. 540, 32 L. R. A. (N. S.) 350); *Huntington v. City of Calais,* 105 Me. 144 (73 Atl. 829); *Daniels v. City of*

Racine, 98 Wis. 649 (74 N. W. 553); *Hay v. City of Baraboo,* 127 Wis. 1 (105 N. W. 654, 115 Am. St. Rep. 977, 3 L. R. A. (N. S.) 84); *Crocker v. City of Hartford,* 66 Conn. 387 (34 Atl. 98); *City of Ft. Worth v. Shero,* 16 Tex. Civ. App. 487 (41 S. W. 704); *Trost v. City of Casselton,* 8 N. D. 534 (79 N. W. 1071); *Gribben v. City of Franklin,* 175 Ind. 500 (94 N. E. 757); *Collins v. City of Spokane,* 64 Wash. 153 (116 Pac. 663, 35 L. R. A. (N. S. 840); *Benson v. City of Hoquiam,* 67 Wash. 90 (121 Pac. 58).)" (Italics added.)

It has even been held that where the plaintiff appeared personally before the Governing Board of the defendant municipality and was told by the officers of the municipality that her claim would be given due consideration and relying thereon, she failed to file her claim within the time prescribed by the act, no estoppel could be raised against the members of the Board to deny the non-filing of a claim under the act, nor did the statement of the Board that her claim would be considered, lift the case from the provisions of the act with reference to the filing of the claim. (*Johnson v. City of Glendale, supra,* at p. 395; *Phillips v. County of Los Angeles, supra,* at p. 80; and *Myers v. Hopland U. E. School District, supra,* at p. 592.)

The cases in California are very specific in holding that the officers of a municipality, county, school district or other district, coming within the provisions of Act 5149, may not themselves waive the provisions of the Act even though it might be their desire so to do. In support of this statement, respondent respectfully submits the fol-

lowing cases: *Johnson v. City of Glendale, supra; Yonker v. City of San Gabriel, supra; Spencer v. Calipatria, supra; Chapman v. City of Fullerton,* 90 Cal. App. 463; and *Western Salt Company v. City of San Diego, supra.*

Petitioners contend that they were under a disability which prevented them from filing their claim within the ninety (90) day period, to-wit, were unable to ascertain the extent of the damages until nearly nine months after the damage occurred. They contend, without citation of any authority in point, that this disability excused compliance with section 1 of Act 5149, and that, in effect, the period within which their claim should have been filed began to run from the time they first ascertained the full amount of the alleged damages. The California cases above cited are ample authority to the contrary, and the digests show that the rule accepted in California prevails in most of the other jurisdictions.

Petitioners, by inference, if not directly, argue that there is a difference between personal physical injuries and damages to real property. They admit that the provisions of Act 5149 apply to cases of personal physical injuries, and then attempt to distinguish injuries to real property.

We submit that it is the experience in personal injury cases that the actual extent of damage cannot be ascertained within ninety (90) days, most frequently not for a much longer period. The cases above cited are clear, however, that even if the plaintiff in such a personal injury case was actually physically disabled, and by reason thereof failed to file his claim within ninety (90) days

from sustaining the injury, his action would be barred.

Petitioners find themselves in no different position. Application of the rule established in California will work no greater injustice upon appellants than upon any other person claiming damage resulting from a dangerous or defective condition of public property or works.

E. From the Statement of Facts Contained in Petitioners' Complaint, Petitioners Have Not Pleaded and Are Now Unable to Plead or Prove the Filing of Such a Claim Within the Period Provided by Act 5149.

Upon a consideration of all of the foregoing, and after consideration of the allegation of petitioners' complaint [R. 1-9], noting that it is therein alleged that the damages complained of occurred on March 2nd, 1938 [R. 5], it not being alleged that any claim of any kind complying with the provisions of Act 5149 was filed with the Clerk of the Board of Supervisors of Ventura County within the period of ninety (90) days from the occurring of the damage, but only that a claim had been filed with the Auditor of the County of Ventura on December 28, 1938 [R. 7], nine (9) months and twenty-six (26) days after the damage occurred, it is quite evident that petitioners have wholly failed to bring themselves within the provisions of Act 5149 and that their complaint is "fatally defective". It being apparent upon the face of the complaint that they are now unable to amend the same to bring themselves within the provisions of Act 5149 under many of the cases above cited, they are not now entitled, under the law of California, to the further process of the Court in this matter. The demurrer was properly sustained without leave to amend.

F. Act 5149 Being Specific and Subsequent in Enactment Is Controlling Over Political Code Section 4075.

Counsel for petitioners contends that Act 5149 should have been construed with section 4075, Political Code (Petitioners' Brief 9, 10, 22).

The point is not a new one, having been raised and decided by the case of *Thompson v. County of Los Angeles, supra,* where it is stated on page 77:

> "Appellant's contention that the act is procedurally uncertain ignores the obvious necessity of construing and applying that act in connection with existing law as set out in Political Code, sections 4075 to 4078, inclusive. When this is done, the particular provisions of the act being paramount to the general provisions of the code (Code Civ. Proc., sec. 1859), there is neither uncertainty nor ambiguity."

This case then goes on to state that the provisions of Act 5149 are mandatory and not merely permissive.

That Act 5149 is controlling over sections 4075-78 of the Political Code is again reiterated in the case of *Cooper v. County of Butte, supra,* at page 45:

> "(1) In 1931 the legislature passed an act known as Act 5149, Deering's General Laws (Stats. 1931, p. 2475), relating specifically to the liability in damages of counties in cases of injuries to persons resulting from the dangerous condition of the highways and requiring the presentation of a verified claim therefor. Sections 4075-4078 of the Political

Code do not specifically relate to the filing of claims for damages arising out of personal injuries caused by defective highways, whereas Act 5149 does concern itself particularly with such matters. Therefore, the provisions of Act 5149 being specific and subsequent in enactment to section 4075 et seq. of the Political Code must govern rather than the general statutory requirements contained in the Political Code. This has been expressly held in the case of *Thompson v. County of Los Angeles,* 140 Cal. App. 73 (35 Pac. (2d) 185)."

The same point was decided in *Kahrs v. County of Los Angeles, supra,* wherein the Court stated on page 49 as follows:

"(2) Section 4075 of the Political Code, relied upon by appellants, is unavailing. The provisions of this section are general, and that the general must yield to the particular is a well-settled doctrine that requires no citation of authority. The trial court was correct in the conclusion that chapter 1167, Statutes of 1931, is controlling. (*Thompson v. County of Los Angeles et al.,* 140 Cal. App. 73, 77 (35 Pac. (2d) 185); *Douglass v. City of Los Angeles,* 5 Cal. (2d) 123 (53 Pac. (2d) 353); *Strath v. City of Santa Rosa,* 19 Cal. App. (2d) 382 (65 Pac. (2d) 894); *Cooper v. County of Butte,* 17 Cal. App. (2d) 43 (61 Pac. (2d) 516).)"

(Chapter 1167, Stats. 1931, referred to in this quotation is the same enactment as is herein designated "Act 5149.")

Petitioners, in their petition, on page 6, in referring to Act 5149 said—

> "No statute of limitations for such limited period, concerning damages to real property, has ever before been enacted in this State, or any other State, so far as petitioners' very extensive examination discloses."

After a brief examination of the cases, we find a similar situation in the case of *Dayton v. City of Asheville,* 185 N. C. 12, 115 S. E. 827, the statement of facts show that the City of Asheville had erected an incinerator (at page 828)

> ". . . for the purpose of destroying and burning city garbage, refuse, etc., on an adjacent lot or one in close proximity to plaintiffs' property . . . and that, by reason of its erection, location, and continuous operation . . . the said houses and lots, . . . , have been, . . . enveloped in smoke arising therefrom, which said smoke, together with grease and ashes, constantly settles upon, damages, and injures plaintiffs' houses and lots and every particle of household furniture and other articles located in said houses or on said lots."

The statement of facts went on to show that the atmosphere was polluted and that plaintiffs' lots could not be used for the customary cultivation and gardening. It was contended that such act was a taking of the property.

The statute of limitations in that instance was three (3) years, but the city charter provided that a *claim must*

be filed within ninety (90) days after the date of the first substantial injury to their property, with the Board of Aldermen of the City of Asheville. The Court, in referring to such requirements states as follows at page 829:

> "(4) The plaintiffs, under the provisions of the city charter, were required to show that their claim for compensation had been filed with the board of aldermen of the defendant city within ninety days after the first substantial injury to their property, which is alleged to have been caused by the maintenance and operation of said incinerator. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738. It has been held with us, in a number of cases, that, as a prerequisite to a suit of this kind, in the absence of a valid excuse (Hartsell v. Asheville, 166 N. C. 633, 82 S. E. 946), it is necessary both to allege and to prove that a demand was made upon the municipal authorities before commencing action; such requirement being incorporated in the city charter. Hartsell v. Asheville, 164 N. C. 195, 80 S. E. 226; Pender v. Salisbury, 160 N. C. 365, 76 S. E. 228; Terrell v. Washington, 158 N. C. 281, 73 S. E. 888."

Respondent does not have access to the statutes of the various states, but feels sure that a further examination of such statutes would disclose similar statutes in the various states of the Union. In the case of *Winters v. City of Niagara Falls, supra,* the statute there provided for a thirty-day notice (see quotation on p. 45 of this brief).

II.

Act 5149 Does Not Violate Either the Thirteenth or Fourteenth Sections of Article I of the Constitution of California or the Fifth or Fourteenth Amendments of the Constitution of the United States.

A. Act 5149 Does Not Violate Section 14 of Article I of the Constitution of California.

Petitioners, in their complaint, have pleaded [R. 7, 9] that section 1 of Act 5149 violates section 14 of article I of the California Constitution which section provides that

> "Private property shall not be taken or damaged for public use without just compensation having first been made, . . ."

[Section 14 of article I of the Constitution of California set out in full in Appendix page 6.]

This identical question, under a similar state of facts has been raised in several cases heretofore presented to the Courts of Appeal in California, and in each case Act 5149, or similar statutes, have been declared not to violate this constitutional section. The leading cases in this connection, involving very similar states of facts as in the instant case, decided before the enactment of Act 5149, are the leading cases of *Crescent Wharf Company v. County of Los Angeles, supra,* and *Western Salt Company v. City of San Diego, supra.*

The case of *Yonker v. City of San Gabriel, supra,* being so similar in its facts that it may be called identical with the instant case, passing upon the provisions of Act 5149, *directly held that Act 5149 applied to this type of case, and that it did not violate the provisions of section 14 of article I of the California Constitution.*

In petitioners' brief (p. 18 and following), petitioners cite several cases purporting to hold that the facts of the instant case constitute a "taking or damaging" for public use. It is submitted however, that in none of the cases cited are the facts at all similar. The cases of *Pumpelly v. Green Bay & M. Canal Co.,* 13 Wall. 166, 20 L. Ed. 557-662; and *Hopkins v. Clemson Agric. College,* 221 U. S. pp. 636-649, 55 L. Ed. pp. 890-897, stressed by petitioners, while arising from injury to property by canals or river work, are distinguishable. In those cases the public work was of a permanent nature, built to handle or control water channels continually carrying waters and causing an underground seepage of a continuous nature. The other cases dealt with damages resulting from river work or the impounding of waters by building of dams where the inundation or seepage would be a permanent taking. There the injury would persist for a long and indefinite period of time, perhaps forever. How different the facts in the instant case. It is uncontradictable, and indeed, the Court may take judicial notice of the fact, that the streams or creeks of Southern California are almost entirely "flash" streams. That during almost all of the year these streams have little, and usually, no water in them, but during the actual period of rain, and for a very few days thereafter, they carry varying quantities of water. During a rain storm they very quickly build up to a "flash" peak, and as rapidly cease to flow, returning to dry or almost dry sandy channels. The question of seepage and infiltration such as entered into the facts of the *Pumpelly, Hopkins* and other cases cited by petitioners make those cases entirely different from the situation existing in California, and particularly in the instant case. In those cases the damages complained of

were of a permanent nature, but here, the damages were temporary in nature. No prior inundations of petitioners' lands were pleaded, and perhaps none may ever again occur in the future. The complaint pleads that the silts deposited have been removed and the irrigation lines replaced. The trees alleged to have been destroyed, if any were completely destroyed, are not a "permanent" loss, for new trees will grow, the land having again been returned to its former agricultural status.

It will also be noted that the *Pumpelly, Hopkins* and other cases, *supra,* cited by petitioners deal with whether the plaintiffs had a right to sue. Respondent does not deny this right but contends that Act 5149 provides a procedure precedent that must be followed, to-wit, the filing of petitioners' claim within ninety (90) days after March 2nd, 1938. *Crescent Wharf Company v. County of Los Angeles, supra,* and *Winters v. City of Niagara Falls, supra.*

We think the case of *Yonker v. San Gabriel, supra,* exactly covers the situation in this case. In discussing the application of article I, section 14 of the California Constitution, the Court, in that decision, on page 558, says:

> "The section of the Constitution referred to provides that private property shall not be taken or damaged for public use without just compensation being made therefor. At the time of the dumping of the material herein referred to by the agents of the City of San Gabriel upon the abutments of the Ramona Street bridge no property of the plaintiff was either taken or damaged. *The damage, if any, was as the*

authorities claim, consequential, but whether it correctly be denominated consequential or direct, immdiate, the record shows no damage resulted from the mere fact of dumping the refuse material upon the abutments referred to, but that subsequently torrential rains occurred, causing an excessive flow in the wash referred to, the waters thereof carrying down the refuse matter upon the property belonging to the plaintiff." (Italics added.)

No damage resulted, nor was any property taken or damaged by the mere construction of, and subsequent extensions to, the drainage ditch here involved, at any time during the twenty-two (22) years prior to March 2nd, 1938, nor are any pleaded in the complaint, but on March 2nd, "torrential rains" occurred, causing an "excessive flow in the wash referred to", resulting in the overflowing of the ditch and the carrying down of debris and refuse material upon the property of petitioners, and damage is alleged to have resulted therefrom.

It is respectfully submitted that the acts complained of did not constitute a "taking or damaging for public use" within the meaning of article I of section 14 of the California Constitution, and the rule established by the cases of *Western Salt Company v. San Diego, supra; Crescent Wharf Company v. City of Los Angeles, supra,* and *Yonker v. San Gabriel, supra,* is controlling in the case here before the Court.

But, assuming that the acts here complained of did amount to the "taking or damaging of private property for public use" as prohibited by article I of section 14, it is the rule in California that where the Constitution declares a right, but does not provide the procedure by which that right may be pursued, the Legislature may

enact reasonable procedural rules for the enforcement of the right. This rule is set out in *Crescent Wharf Company v. County of Los Angeles, supra,* at page 436, where it is said:

> "When a state constitution such as ours provides neither the mode for the taking nor for the payment of private property the mode of procedure may be provided by either statutory or charter provisions. The following quotation taken from 16 Cal. Jur. 396, 397, is supported by the decisions of this state:
>
> " 'The power to impose reasonable periods of limitation is unquestioned, for a statement of a right in a constitution is always subject to reasonable statutory limitations of the time in which such right may be enforced, unless the constitution itself declares otherwise. The legislature may prescribe the different periods of time within which different species of obligations may be enforced and may prescribe that as to some obligations there shall be no limitation of time . . .'"

The opinion, at page 437, then cites the following from the case of *Bancroft v. City of San Diego,* 120 Cal. 432, 52 Pac. 712:

> "The *policy* of a charter adopting a six months' period in which claims for damages to property, which is in a sense a taking of the property, is held to be beyond question."

See, also:

> *City of Los Angeles v. Oliver,* 102 Cal. App. 299, 283 Pac. 298.

A few of the many other cases supporting the rule that charter provisions relating to the filing of claims must be complied with, are:

Bigelow v. City of Los Angeles, 141 Cal. 503, 75 Pac. 111;

Spencer v. City of Los Angeles, 180 Cal. 103, 179 Pac. 163;

Metropolitan Life Insurance Co. v. Rolph, 184 Cal. 557, 194 Pac. 1005;

Alden v. Alameda County, 43 Cal. 270;

Rhoda v. Alameda County, 52 Cal. 350;

McCann v. Sierra County, 7 Cal. 121.

The Court's attention is particularly directed to the case of *McCann v. Sierra County, supra,* last above cited, for the reason that as early as 1857, when that case was decided, the courts have held that even though the act complained of be a taking in violation of a right declared by the constitution, a statute providing the means of pursuing that right must be pleaded or the cause of action does not accrue.

In the *McCann* case, *supra,* the County of Sierra extended a road across the lands of plaintiff without condemnation proceedings and without any provision for compensating McCann, who filed a complaint in two counts. The first count was for a restraining order, the second for damages for the taking. Under the County Government Act then in force, it was provided (p. 124) that

". . . 'no person shall sue a county *in any case,* for any demand, unless he or she shall first present

his or her claim to the board of supervisors for allowance, and the same shall be rejected in whole or part.'" (Italics added.)

At that time, the Constitution of California, relating to the "taking" of land for public use provided (p. 123):

". . . 'that private property shall not be taken for public use, unless just compensation be made therefor.'"

In the *McCann* case, *supra,* it will be noted, the taking *was deliberate, not accidentally caused by torrential rains,* but the Court nevertheless ruled that the general law was applicable, and sustained the demurrer, the complaint not alleging the filing of a demand as required by the statute.

B. Act 5149 Does Not Violate the Provisions of Section 13, Article I of the Constitution of California.

The complaint in this case does not plead a violation of section 13, article I of the Constitution of California. The question, however, was argued by petitioners in the Court below. Inasmuch as section 13, article I raises the same question as is raised by the Fourteenth Amendment to the Federal Constitution, Due Process, section 13, article I, will be later included in discussion of the Fourteenth Amendment.

[Section 13, article I, Constitution of California is set forth in full in Appendix page 6.]

C. THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES DOES NOT APPLY TO THE VARIOUS STATES, BUT IS A LIMITATION UPON THE FEDERAL GOVERNMENT ONLY, AND HENCE IS NOT HERE APPLICABLE.

In their complaint, petitioners have contended that the provisions of section 1 of Act 5149, and the acts of respondent, violate the provisions of the Fifth Amendment to the United States Constitution [R. 8]. It is respectfully urged that the Fifth Amendment to the Constitution has no bearing on this particular case. The Fifth Amendment, in so far as it might be here applicable reads—

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It has long been accepted by the courts of the United States that the *Fifth Amendment acts only as a limitation upon the Federal Government,* prohibiting it from abridging any of the rights therein declared. It has no application to laws enacted by the various states. (*Nebbia v. New York,* 291 U. S. 502 at 528 (78 L. Ed. 940 at 950), 12 Cor. Jur. 959, page 1194 and approximately fifty cases cited there, Cor. Jur. Sec., Vol. 16, p. 1146, Sec. 568-b and many cases there cited.) It is respectfully submitted that application of the Fifth Amendment is not here under consideration.

D. THE CONTENTION THAT ACT 5149 IS VOID AS AGAINST PUBLIC POLICY AND DUE PROCESS IN THAT IT PERMITS AN ALLEGED DELEGATION OF AUTHORITY TO APPROVE OR REJECT CLAIMS TO INSURANCE CARRIERS.

Petitioners contend that Act 5149 is unconstitutional by reason of the fact that it contains a provision permitting the public bodies embraced within its scope to insure against injuries or damages resulting from the dangerous or defective condition of public buildings, parks, grounds, works or property, either by self-insurance or in any authorized insurance company (section 3). Their contention is apparently based upon the premise that boards of supervisors are *deprived* of the power to pass upon and determine whether claims should be granted or rejected. The statute makes no such delegation, and the weakness of the contention is apparent. The act specifically *requires* the board to pass on such claims.

Whatever the case may be in respect to other counties, respondent is unable to conceive in what manner petitioners are injured in the current case inasmuch as their belated claim was presented to the Board of Supervisors of the respondent county, and was passed upon and denied by said county, (without the assistance or intervention of insurance company attorneys), the petitioners having failed to file the same within the time provided by Act 5149. Under the provisions of Act 5149 and the many cases cited by respondent, the Board was without authority to waive the provisions of the act and to grant the claim (*Myers v. Hopland, etc. School District, supra; Johnson v. City of Glendale, supra; Yonker v. San Gabriel, supra; Spencer v. Calipatria, supra; Chapman v. City of Fullerton, supra; Western Salt Company v. City of San Diego,*

supra; Cooper v. County of Butte, supra), and any payment to the petitioners, had the Board determined that petitioners were entitled to compensation, would have been an illegal expenditure of public money.

Incidentally, the Court will note from the record herein that (unfortunately) no brilliant insurance specialist appears for the respondent county, counsel herein being "run of the mill" members of the District Attorney's staff. The county is not indemnified by any policy of liability insurance covering the situation embraced by this cause.

Assuming, however, that it had been so insured, petitioners would be in no different situation than if they had been representing a petitioner suing the county under a workman's compensation policy, fire insurance policy, or accident policy indemnifying them against personal injuries and property damage as a result of fallen buildings, automobile injuries or any other types of indemnity.

The District Court of Appeal in its decision in this case adequately disposes of petitioners' contention in this respect. If Act 5149 is indeed unconstitutional as being against public policy and violating due process because the county might have insured itself, then every statute which provides for and permits the carrying of insurance by schools, counties and other public agencies is void and the statutes of the State must indeed be in a very muddled condition.

As a matter of fact, it can readily be seen that the insuring by a county or other public agency might be of great protection to petitioners. It is not inconceivable that in some of the smaller counties, a judgment, if allowed in the amount prayed for in this cause, would find those small counties without funds with which to pay

such a judgment and the successful litigant in such a case would have to wait for some period of time until assessment was made and collected from the taxpayers for the purpose of paying the judgment. But where such insurance was available the compensation or damages would be forthcoming in a relatively brief time after final judgment. It is respectfully contended that petitioners' contention and argument in this respect are entirely unsound.

E. Act 5149 Does Not Violate Any Provision of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

We submit that unless Act 5149 does indeed violate due process as prohibited by section 13, article I of the Constitution of California, or section 1 of the Fourteenth Amendment to the Federal Constitution, petitioners' prayer for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two, must be denied.

Petitioners, in their brief (page 19) claim that Act 5149 violates the due process provisions of the Constitution of the United States, although no California cases are cited in this regard.

In the case of *Crescent Wharf Company v. City of Los Angeles, supra,* decided before the amendment of Act 5149, a city charter required the filing of a claim. As stated in the decision, there was no general law relating to suits for damages against municipalities and the Court says at page 437:

> " 'It is, however, claimed that this provision of the charter is invalid for the reason that the freeholders' charter conflicts with the general law, and is only

> supreme in 'municipal affairs.' . . . This contention is predicated upon the proposition that by the general law a complaint for damages is a sufficient presentation of a demand against an individual or private corporation. The question involved here, however, is an entirely different one namely, the method of securing payment of claims against a municipality, an agency of the state. There is no general law upon that subject, but the charter of each municipality prescribes the method for such payment. The charter controls, and, as plaintiff has failed to present his claim for damages within the time provided by the charter, the demurrer was properly sustained.' "

Several earlier cases in effect make the same statement and, as in the *Crescent Wharf* case, *supra,* hold that the filing of a claim under a *charter provision* so requiring is a condition precedent to maintaining an action against a municipality. In 1931, Act 5149 was enacted and since then there has been a "general law" relating to suits against counties, cities, school districts, etc., affecting equally all persons coming within its scope.

Section 13, article I, California Constitution reads, so far as is here applicable—

> "Sec. 13. . . . No person shall be . . . deprived of life, liberty, or property without due process of law."

Section 1, of the Fourteenth Amendment, United States Constitution reads, so far as here applicable—

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That section 1 of Act 5149 does not violate the "equal privilege and immunities" or the "equal protection" clauses of the section above cited, is evident. Act 5149 does not apply to citizens of any individual state in preference to the citizens of any other state, nor to any group of persons claiming against a county to the detriment or distinguishment of any other group of parties suing a county. The section applies equally to any and all persons, regardless of their status or the state of their residence, *"whenever* it is claimed that *any"* such *"person* has been *injured* or *any property damaged"* as the result of acts or things stated in section 1 of the Act.

This leaves us a consideration of whether or not the Act violates the "Due Process Clause" of section 1 of the Fourteenth Amendment of the Constitution of the United States. In only one of the cases cited by petitioners, has it been held, or even inferred, that a ninety-day limitation is not a reasonable limitation, and the one case cited by them, is a case based on a Statute of the State of Colorado. That case states that a ninety-day limitation is unreasonable and violative of the Due Process clause. But the Colorado statute referred to in the case cited by petitioners (*Lamb v. Powder River Live Stock Co.* (8th Cir.), 132 Fed. 434-444) is in no way analogous to the case here before the Court.

The opinion in the *Lamb* case, in passing upon the Colorado statute there under consideration, discussed at length the unfairness of that statute in fixing a ninety-

day statute of limitation applicable to non-residents as distinguished from residents of Colorado. The Colorado statute was discriminatory, and the Court held that inasmuch as there was no reasonable basis for the discrimination, the statute violated Due Process.

As heretofore pointed out, no such objection may be made to Act 5149. It applies equally to every person in this and every other state,

> "*Whenever* it is claimed that *any person* has been injured or *any property* damaged as a result of the dangerous or defective condition of any public . . . grounds, works or property, . . ." (Italics added).

There is, of course, this further distinction in the *Lamb* case, *supra,* and the case now before the Court. In the *Lamb* case, there were no procedural steps to be taken—no notice or claim to be filed. In the instant case, the Statute of Limitations has never started to run, for, as the cases state, inasmuch as petitioners did not comply with the procedural "condition precedent" the cause of action against which a Statute of Limitations could run, never accrued. Had that procedural step been taken by petitioners, the Statute of Limitations would not have expired for at least nine (9) and perhaps twelve (12) months from March 2nd, 1938, for the reasons pointed out on pages 47 and 48 of this brief.

It is difficult to think that the courts of California having had presented to them some fifteen (15) cases coming directly within the provisions of section 1 of Act 5149, and numerous cases prior to the enactment of Act 5149, involving periods of limitation, or, more properly, periods within which certain procedural steps must be complied with before a cause of action will accrue, and having consistently sustained the provisions of the char-

ters so providing, and the provisions of Act 5149, that such courts would have overlooked such an important phase of the law as due process, for it is to be inferred that such courts will render justice even though counsel presenting the various causes referred to may have overlooked the particular point raised by petitioners in this case.

It has been stated in Vol. 12 Corpus Juris, p. 1188, Sec. 956 and Vol. 16 C. J. S., page 1140, Sec. 567, that "due process" has no universally accepted definition.

We feel that the subject of due process, as applied to a "taking" of land and statutes relating thereto, as well as the intent and application thereof, is well discussed in the California case, *City of Los Angeles v. Oliver, supra.* The discussion of Due Process in that case is lengthy, but thorough, and for the sake of brevity, reference is made thereto, without quotation. The Court will note, however, that the case was one of eminent domain, involving an *intentional* taking (as distinguished from an *unintentional* damaging) of property. The case quotes extensively from Federal cases, and we submit, disposes of every constitutional contention made by petitioners.

It is difficult to conceive in what manner petitioners have been deprived of due process. Act 5149 provides a procedural step only. In strict effect, it is not a Statute of Limitations at all, as was stated in the case of *Winters v. City of Niagara, supra.*

This case, dealing with a charter provision requiring the filing of a claim within *thirty days* after injury or damage, is cited with approval by the very latest case in California relating to Act 5149 (*Gapin v. City of Los Angeles, supra,* decided in September, 1939).

The following quotation is from the case of *Winters v. City of Niagara Falls, supra,* at page 1102:

> "Very correctly, the opinion of the court below disposed of the plaintiff's contention that the provision of the charter with respect to the time for presentation of a claim was a statute of limitation, the running of which, within the provisions of Code Civ. Proc. Sec. 396, would be suspended during infancy. *It was nothing of the kind, for, as it was observed, the requirement does not relate to the commencement of an action. The statute requires the presentation of a claim to be made within 30 days of the occurrence causing the damage, and it bars an action against the city in the case of an omission to do so.* The provision therefore became an essential part of a complainant's cause of action, and compliance with its requirement was a fact to be alleged and proved, like any other condition precedent to the existence of an obligation . . . *To require the presentation of a claim within a specified time is quite a reasonable provision,* inasmuch as thereby the municipality is afforded a measure of protection against stale claims, or the possible connivance of corrupt officials. *It permitted an investigation into the occurrence to be had at a time when the evidence relating to it might more readily be collected.*" (Italics added.)

It will be noted that in this case, the period within which a claim must be filed in the event of injuries under a provision of a city charter almost identical with those of Act 5149, is *thirty days.* In this case, it was held that the thirty-day provision was reasonable and failure of the claimant, a minor, to file a claim within that period, and to allege in his complaint that such filing has been made, was fatal to his cause of action.

Petitioners contend in their brief that because they allege they were unable to ascertain the true amount of the damages within the period of ninety (90) days, that Act 5149 does not apply, that Act 5149 is unreasonable, and in effect, that they should be accorded a period of time after they have ascertained the damages in which to file their claim, and that because the act does not so provide, they have been denied due process of law.

Cases heretofore cited in connection with other points in this brief, relating to disabilities such as minority, physical disabilities and the like (*Yonker v. San Gabriel, supra, Phillips v. Los Angeles, supra, Winters v. Niagara, supra*) definitely overrule this contention and it is particularly called to the attention of the Court that had petitioners, within the ninety (90) day period provided by Act 5149, filed a claim for damages, setting forth, (even if grossly exaggerated), their alleged damages as they were then able to ascertain them, they would now be legally before the Court. This contention was recognized by the decision of the Court which petitioners here seek to review [R. 36].

> *"Plaintiffs were not called upon to file more than a general statement of their claim, which could doubtless be prepared within a period of ninety days.* If their claim could not be settled by negotiation with the authorities of defendant county, accurate and complete proof of the extent of the damages could be prepared for an action in court. In this regard they are in no different position from that of most of the claimants for damages for personal injuries, who as a general rule cannot determine the exact amounts of their damages within ninety days from the dates of the accidents. *Plaintiffs cannot successfully argue that by the statutory requirement*

of filing a claim they were deprived of due process of law. The legislature has furnished due process to them but they did not avail themselves of it." (Italics added.)

The amount of damages would have been a matter of proof to be decided in Court. They would then have complied with the "procedural step" referred to by many of the preceding cases, and the Board of Supervisors and the respondent County would have been in a position to have ascertained the extent of the damages and to have entered into negotiations with petitioners. If their claim had been just, the Board of Supervisors would have then been legally authorized under the Act to negotiate and to make a just settlement of the damages, if any in fact existed. In the event that the claim was unfounded or the Board of Supervisors of respondent County, after investigation, were unable to admit liability, and the claim had then been denied, or the claim had been held by the Board of Supervisors for a period of ninety (90) days, unacted upon, the same would have been denied by lapse of time (Political Code, Section 4078), [set forth in full in Appendix p. 5]. The petitioners would then have had six (6) months within which to file their complaint (Sec. 342 C. C. P. and Sec. 4078 Pol. Code), [Sec. 342 C. C. P. set forth in full in Appendix p. 5]. Not until the rejection by the Board, or the lapse of ninety (90) days inactivity by the Board, would the "Statute of Limitations" within which actions must be filed in this particular type of case, have started to run, and the time within which peti-

tioners would have been barred by the Statute of Limitations, beginning on March 2nd, 1938, would have extended for a minimum period of more than nine (9) months. As it is, petitioners have really failed to avail themselves of, and have actually waived, the due and orderly process of law established to protect both the public at large and the instrumentalities of the State, in this case, a county.

It is hard to see where the petitioners have in any way been deprived of due process. *The "process" was there, petitioners merely neglected to avail themselves of it.*

It has been said that legislation must have a

> ". . . reasonable relation to a proper legislative purpose." (16 C. J. S. page 1157, Sec. 569.)

But short reflection will indicate that Act 5149 very definitely has a "reasonable relation to a proper legislative purpose", that purpose being to obviate the situation in which the respondent County finds itself by reason of the failure of petitioners to file a claim within the ninety (90) day period provided by Act 5149.

It must be borne in mind, assuming the original acts of the county were indeed a taking, as contended by petitioners, that *such taking was not intentional,* nor was the flooding of petitioners' land done with the knowledge of respondent. Act 5149 provides that the Board of Supervisors may, after the filing of the claim within the time allowed thereby, with the consent of the District Attorney, compromise such a claim. Respondent was deprived of this right by petitioners' failure to so file its claim.

Conclusion.

Act 5149 is constitutional, it reasonably relates to a proper legislative purpose—the purpose of preventing public bodies from being harassed and embarrassed in their public functions by unreasonable delays and by the destruction or removal of all the evidence necessary, either for the purpose of determining reasonable compensation, or in defending suits for damages, whether those damages be based on injuries to person or property. *Neither the purposes, nor the act, is arbitrary, capricious, discriminatory or unreasonable.*

Had the legislature intended that disability such as that claimed here by petitioners should act to relieve them of the requirements of section 1 of Act 5149, the legislature would have included such an exception in the act itself at the time of its enactment. As was stated by the Court in *Johnson v. City of Glendale, supra,* at page 395, in discussing this very section:

> ". . . It states no exceptions and we are unable to believe that any were intended. If there were to be exceptions they should have been stated in the act itself. It is not for the courts to create them. It must be presumed that the legislature would have made disability an excuse for failure to present a claim had it been intended to grant that privilege. There is nothing novel in this class of legislation. Wherever liability of municipalities for negligence is recognized, general laws, charter provisions or ordinances will be found imposing conditions upon the assertion of claims for damages, and many such are

discussed in the books which are far more rigorous than our own statute. Without excusing the presentation of claims during possible periods of disability, the 1931 statute allows ninety days in which to make claim, and this must be conceded to be a *liberal period when the purposes of the law are considered*, one of such purposes, *and a very important one, being to afford the municipality an opportunity to investigate the cause of the accident and the extent of the injury or damage.*" (Italics added.)

Respondent respectfully reiterates the contention that petitioners' petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, should be denied.

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